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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GLENDA LOVELL, Plaintiff and Appellant, v. STANLEY FONG et al., Defendants and Respondents.	A144637 (Alameda County Super. Ct. No. HG14734381)

This is the second action brought by Glenda Lovell concerning alleged construction defects in a home built by respondent Ben Li Qiu and purchased by appellant from respondents Stanley and Sofia Fong. Appellant appeals from a judgment sustaining respondents' demurrers to her complaint, dismissing her action and awarding attorney fees. She contends the trial court erred in finding her action barred by her previous action against the same defendants and in awarding attorney fees despite respondents' refusal to participate in mediation. We affirm.

STATEMENT OF THE CASE AND FACTS

On October 26, 2011, appellant filed a complaint for damages against respondents for violation of statutory construction standards and breach of express warranty (*Lovell I*). The first cause of action alleged violation of the construction standards set forth in section 896, a provision of the Right to Repair Act. (Civ. Code, § 895 et seq. (Act).)[1] Appellant alleged that respondents were " 'builders' within the definition of

[1] Further statutory references will be to the Civil Code unless otherwise specified.

Civil Code section 911" of a single family residence in Hayward, California, which appellant contracted to purchase from respondents Stanley and Sofia Fong (the Fongs) on June 1, 2005, for $900,000 cash. Escrow closed and the deed was recorded on August 17, 2005. Appellant alleged that the dwelling violated the construction standards of section 896 due to a number of conditions described in the August 29, 2010, report of a state licensed engineer: (1) "Foundations, load bearing components and slabs have significant cracks"; (2) "Load bearing components have significant vertical displacement and are structurally unsafe"; (3) Foundation, load bearing components and slabs, and underlying soils have not been constructed as to materially comply with design criteria set by applicable government building codes, regulations and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction"; (4) "Foundation systems and slabs permit water and vapor to enter into the structure so as to damage other building components."

Appellant alleged that she sent written notices to respondents advising them of her claims and enclosing the engineer's report, in accordance with pre-litigation procedures specified in sections 910 through 938. The Fongs disclaimed liability and refused to comply with statutory pre-litigation procedures or further communicate.[2] Qiu responded with a "nominal cash settlement" that appellant rejected as inadequate, failed to comply with statutory time limits and was unwilling to offer "a realistic repair plan." Appellant alleged that mediation was not feasible due to the Fongs' refusal to communicate.

In her second cause of action, appellant alleged that on June 6, 2005, Qiu gave her a letter referencing the property and stating, "I will warranty the roof, attached fixtures, foundation and walls against structural defects for period of five years from the date of the close of escrow." On August 14, 2010, appellant's engineer inspected the premises and found "significant defects in the roof, fixtures, foundation and walls." Qiu denied the

[2] The Fongs replied to appellant's attorney with a letter stating that the purchase agreement for the property stated, "[s]ellers will provide no warranties related to the structure" and "[b]uyer takes the property in 'As Is' condition, and that the purchase included a warranty letter from the contractor, Qiu.

existence of the defects and did not make the warranty repairs despite appellant's demand.

On her first cause of action, appellant sought to recover from respondents "reasonable repair costs and related expenses in the sum of $203,374" and costs of suit. On her second cause of action, appellant sought the same recovery from Qiu alone, "if found to be subcontractor."

The Fongs and Qiu filed separate motions for summary judgment, both of which were granted after hearings. The court's order granting the Fongs' motion explained that appellant had failed to meet her burden of demonstrating a triable issue of fact as to whether the Fongs were "builders" within the meaning of section 911, subdivision (a).[3] Qiu's motion for summary judgment was granted for the same reason.[4] Additionally, the court rejected appellant's argument that Qiu could be held liable for negligence pursuant to section 936, despite not being a "builder" under section 911, because "the only theory of liability asserted in the complaint is that Qiu is liable for construction defects as a 'builder.' " As appellant could not prevail on the second cause of action based on the warranty letter because Qiu did not receive notice of any of the alleged structural defects until after expiration of the five-year warranty period, the court rejected appellant's argument that "the parties executed a different express warranty on July 11, 2005, which

[3] Section 911, subdivision (a), defines "builder" as "any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim." The trial court found the Fongs did not come within this definition because the evidence showed that the home they sold to appellant was the only one they had built and sold.

[4] The court explained that Qiu had presented evidence that he was "merely a 'general contractor' and not a 'builder' " within the statutory definition because he had no ownership interest in the home, was not a partner of the Fongs and received payment only for his services as a general contractor, and that appellant had failed to present evidence supporting her argument that Qiu was part of a "joint venture" with the Fongs or, as stated above, demonstrating an issue of fact as to whether the Fongs were themselves builders under the statutory definition.

provides for a ten-year enforcement period" because "the only warranty sued upon was the five-year warranty."

We affirmed the trial court's judgment, holding that appellant failed to raise a triable issue of fact as to whether respondents were builders within the meaning of section 911 or to allege negligence or violation of the 10-year warranty. In addition, we rejected appellant's argument that she should have been allowed to amend her complaint to allege negligence and to identify a different warranty because she never sought leave to amend in the trial court.

On July 25, 2014, appellant filed a complaint for negligence and breach of express warranty contract, again seeking damages in the amount of $203,274 for "reasonable repair costs and related expenses" (*Lovell II*). The first cause of action alleged that respondents caused the negligent construction of the home appellant purchased from the Fongs, as a result of which the home violated the construction standards of section 896 by reason of the conditions described in the 2010 engineer's report and damaged appellant in the amount of $203,373.[5] In the second cause of action, appellant alleged that on June 11, 2005, respondents signed a " 'New Building Structural Construction Warranty' which explicitly incorporated the warranties of SB-800 and acknowledged the homeowner right to bring an action for construction defects under SB-800."[6] Respondents were informed of significant structural defects in the roof, fixtures, foundation, and walls found by the engineer who inspected the home on August 14, 2010, and breached the warranty by denying the existence of the defects and failing to make the warranty repairs despite appellant's demand, causing appellant damages in the amount of $203,274.

[5] While the first cause of action pleads damages of $203,373, the prayer for relief seeks damages of $203,274, which is consistent with the damage amount alleged in the second cause of action.

[6] Although the complaint alleges respondent signed the warranty on June 11, 2005, the document is dated June 13, 2005, and indicates it was signed by appellant, an agent and a broker on June 13, by the Fongs on June 17, and by Qiu on July 11. The trial court referred to this warranty as the "July 11, 2005" warranty. We will refer to this document as the 10-year warranty.

After the case was assigned to Judge Petrou, the Fongs filed a notice of related case, indicating that it involved the same parties, alleged injuries and damages as the prior case, and stating that appellant would not be able to peremptorily challenge Judge Harbin-Forte, who had presided over the prior case, because the present case " 'arises out of' " the original one. (Code Civ. Proc., § 170.6.) Over appellant's objection, the cases were found to be related and *Lovell II* was reassigned to Judge Harbin-Forte. Then, over the Fongs' objection, appellant successfully exercised a peremptory challenge, and the case was assigned to Judge MacLaren.[7]

Qiu and the Fongs filed separate demurrers arguing the case was barred by res judicata. The Fongs also moved for sanctions against appellant's attorney on the ground that the complaint was not warranted by existing law and was filed with the primary purpose of harassing the Fongs. (Code Civ. Proc., § 128.7) The demurrers were sustained without leave to amend after a hearing on December 18, 2014, and a judgment of dismissal was filed on January 21, 2015. The Fongs' motion for sanctions was denied on January 23, 2015.

On February 2, 2015, the Fongs filed a motion for attorney fees in the amount of $16,439.50, as the prevailing parties in a dispute under their purchase contract with appellant. Appellant opposed the request on grounds including that the terms of the contract precluded the Fongs from recovering fees due to their refusal to mediate the dispute upon appellant's request before she filed the complaint in *Lovell I.* The matter was set for hearing on February 26, 2015. The day before the hearing, after the trial court issued a tentative decision finding the Fongs entitled to fees, appellant filed a request for

[7] The Fongs argued that the new case was a "continuation" of the prior one that should preclude a peremptory challenge under the rule that a peremptory challenge under section 170.6 " 'may not be made when the subsequent proceeding is a continuation of an earlier one.' " (*Manuel C. v. Superior Court* (2010) 181 Cal.App.4th 382, 385; *Pickett v. Superior Court* (2012) 203 Cal.App.4th 887, 892-893.) The trial court held that the two cases here were "related" but the new one was not a "continuation" in that it was based on a theory specifically held not to be at issue in the first case.

The Fongs filed a petition for writ of mandate and prohibition in this court, which was subsequently dismissed at their request. (*Fong v. Superior Court*, A143644.)

mediation. Following the hearing on February 26, the court held that the Fongs were entitled to fees but the amount requested was overstated, and continued the matter for further briefing and hearing.

Appellant filed a notice of appeal from the judgment of dismissal on March 19, 2015.

On March 26, 2015, the trial court awarded the Fongs attorney fees in the amount of $10,360. Pursuant to the court's direction, an amended judgment including the attorney fee award was filed on April 30, 2015. Appellant objected to the "form and substance" of the amended judgment as improperly imposing the fee award after appellant appealed the original judgment, which did not provide for attorney fees. This court subsequently granted appellant's request to amend her notice of appeal to include the amended judgment and designate a supplemental record to address new issues injected by the amended judgment. Appellant filed an amended notice of appeal on June 23, 2015.

DISCUSSION

"When reviewing a court's dismissal of a lawsuit following an order sustaining a demurrer without leave to amend, we initially review the complaint de novo to determine whether, as a matter of law, the complaint alleges a valid cause of action. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153 (*Gomes*).) We assume the truth of all properly pleaded and judicially noticeable material facts within the complaint, but we do not assume ' " ' "contentions, deductions or conclusions of fact or law." ' " ' (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1501 (*Herrera*).)" (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 506-507, overruled on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.)

I.

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a

second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) Relitigation of a cause of action is precluded "only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974.)" (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82 (*Zevnik*).) " 'Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief. (*Boccardo v. Safeway Stores, Inc*. (1982) 134 Cal.App.3d 1037, 1043.)' " (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245, quoting *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285.) Moreover, "[r]es judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding. [Citation.]" (*Zevnik*, at p. 82.) " ' "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811.)' " (*Weikel*, . . . at p. 1245, quoting *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1619-1620.)

Appellant argues res judicata does not apply to her case because *Lovell I* did not result in a final judgment on the merits and did not involve the same causes of action as *Lovell II*. On the first point, appellant argues there was not a final judgment on the merits in *Lovell I* because the only issue resolved was whether the Fongs were "builders" within the meaning of section 911 and the questions whether there was negligent construction or breach of the 10-year warranty contract were not litigated or determined. The two cases involve different causes of action, appellant maintains, because *Lovell I* alleged a statutory claim addressing a different "harm" than the negligence claim in *Lovell II*, and, with respect to the claimed breach of warranty, *Lovell I* alleged a different warranty contract than was alleged in *Lovell II*.

A.

"California's res judicata doctrine is based upon the primary right theory." (*Mycogen, supra,* 28 Cal.4th at p. 904). Under this theory, "a ' "cause of action" is comprised of a 'primary right' of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.]' " (*Ibid.*) A primary right " 'is simply the plaintiff's right to be free from the particular injury suffered,' " and violation of a primary right gives rise to a single cause of action. (*Ibid.*) The primary right must be " 'distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." [Citation.]' " (*Ibid.*) " '[W]hen a plaintiff attempts to divide a primary right and enforce it in two suits,' " " 'if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata.' " (*Ibid.*)[8]

The trial court held that appellant's claim for violation of the Act in *Lovell I* and her claim for negligence in *Lovell II* violated a single primary right—the right "to purchase a house that does not have construction defects." Appellant argues this characterization is "overbroad, superficial, vague and fallacious" because a construction

[8] Some confusion may arise from the fact that the term "cause of action" has more than one meaning. " 'In a broad sense, a "cause of action" is the *invasion of a primary right* (e.g. injury to person, injury to property, etc.). . . . [¶] However, in more common usage, "cause of action" means a group of related paragraphs in the complaint reflecting *a separate theory of liability*. . . .' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1992) § 10:39, p. 10–12.1, italics in original.)" (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853; see, *Baral v. Schnitt* (2016) 1 Cal.5th 376, 381.) Appellant's division of her complaint into two "causes of action" reflects the second of these meanings. The question for purposes of res judicata is whether the "causes of action" alleged in the first and second complaints involve the same or different primary rights.

defect can result in both personal injury and property damage, which have long been recognized as distinct causes of action. According to appellant, reference to "construction defects" does not determine what harm is suffered and therefore what primary right is violated. Instead, she urges, a statutory action under the Act is a different cause of action than an action for negligence because a tort action requires proof of actual damages and the Repair Act was enacted to reach construction defects that have caused economic damage but not physical injury or property damage.

As appellant explains, the California Supreme Court held in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632 (*Aas*), that homeowners could not recover damages in a negligence action for construction defects that have not caused property damage. The homeowners sought recovery for the cost of repairing the alleged defects and the diminution in value of their homes. (*Id.* at p. 633.) The court "explained that under the economic loss rule, 'appreciable, nonspeculative, present injury is an essential element of a tort cause of action.' (*Id.* at p. 646.) 'Construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses,' we held, 'do not comfortably fit the definition of " 'appreciable harm' " —an essential element of a negligence claim.' (*Ibid.*)" (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079 (*Rosen*).)

The Act, enacted in 2002 as Senate Bill No. 800, was a response to, "among other things, 'concerns expressed by homeowners and their advocates over the effects' of [the] decision in *Aas, supra,* 24 Cal.4th 627, 'that defects must cause actual damage prior to being actionable in tort.' (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 28, 2002, p. 1.)" (*Rosen, supra,* 30 Cal.4th at p. 1079.) It was enacted "to provide remedies where construction defects have negatively affected the economic value of a home, although no actual property damage or personal injuries have occurred as a result of the defects." (*Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, 101.)

Appellant argues that a negligence action directed at actual property damage or personal injury is necessarily a different cause of action than an action under the Act

directed at economic damage based on diminution of value because the two actions are directed at different "harms." As an abstract proposition, this may be—but this is not the question before us and we need not address it. The relevant question is whether appellant's first and second complaints in fact alleged violation of the same or different primary rights. The two complaints alleged the same construction defects and sought the identical amount in damages "[f]or reasonable repair costs and related expenses." The complaint in *Lovell II* did not allege any injury that was not alleged by the complaint in *Lovell I.* The only difference between the two complaints is in the theories of recovery they assert. Contrary to appellant's suggestion, while *Aas* and *Liberty Mutual* demonstrate that different remedies are available in construction defect cases depending on whether the defects have caused personal injury or property damage or only economic damage, nothing in these cases suggests that the identical defects, alleged to have caused the identical damage, can support successive suits to pursue these different remedies.

Although appellant argues to the contrary, this case is analogous to *Slater v. Blackwood* (1975) 15 Cal.3d 791. There, after being injured in a car accident while riding as a guest in the defendant's car, the plaintiff unsuccessfully sued for damages under a then-existing "guest statute" that limited recovery to death or injuries resulting from intoxication or willful misconduct. (*Id.* at p. 794.) Later, the guest statute was held unconstitutional and the plaintiff filed a new complaint against the same defendants based on the same accident but alleging negligence. (*Ibid.*) Rejecting the argument that negligence was a different cause of action from the statutory claim alleged in the prior case, *Slater* held the second suit was barred by res judicata because even though it asserted a different legal theory for recovery, it alleged violation of the same primary right. (*Id.* at pp. 794-796) "The 'primary right' alleged to have been violated in the instant case is plaintiff's right to be free from injury to her person. [Citations.] It is clearly established that '. . . there is but one cause of action for one personal injury [which is incurred] by reason of one wrongful act.' [Citations.]" (*Id.* at p. 795.)

So, here, appellant alleged precisely the same injury in both cases—the construction defects in her home discovered by her engineer's inspection. Appellant

sought to recover for the cost of repairing these defects under different legal theories—negligence, in *Lovell II*, and strict liability in *Lovell I*—but the harm she suffered was identical and, therefore, implicated the same primary right.

Weikel, supra, 55 Cal.App.4th 1234, provides another example. Plaintiff, the owner of a shopping center, sought to build on a wedge of land that was part of the boundary between his shopping center and an adjacent one. (*Id.* at p. 1237.) Negotiations resulted in easements recorded in 1984 and then a 1987 lot split agreement substituting new easements and containing key provisions related to the shop of a tenant in the adjacent shopping center. (*Id.* at pp. 1238, 1240.) The plaintiff's first suit alleged theories including breach of the 1984 and 1987 agreements, fraud, rescission, injunction against unreasonable water discharges, injunction requiring modification of the tenant's shop, and restitution. (*Id.* at p. 1242.) Judgment was entered in favor of the defendant owner, the "essential basis" of which was that the 1987 lot split agreement was rescindable, rendering moot the plaintiff's claims based on that agreement and reinstating the original easements. (*Ibid.*) After that judgment was affirmed, the plaintiff filed a new suit against the same defendants, alleging claims for quiet title, trespass, nuisance (the tenant's shop), breach of an implied covenant, declaratory relief and restitution. (*Id.* at pp. 1242-1243.) These claims were based on the 1984 easements. (*Id.* at p. 1243.)

Weikel held that the second suit was barred by res judicata because a single primary right was the basis of all the plaintiff's claims, the "interest in constructing a building on a portion of the 'wedge.' " (*Weikel, supra,* 55 Cal.App.4th at p. 1248.) Rejecting the plaintiff's argument that the 1984 access easements were not at issue in the first case, which " 'focused' " on the 1987 lot split agreement and deed, the court stated, "[w]hile counsel may have had a variety of reasons for having *chosen* to limit the scope of *Weikel I*, it is clear that the 'rights arising from' all of the 1984 instruments *could have been litigated* therein." (*Id.* at pp. 1248-1249.) The court explained that "the 'conflict' has not, since the time of the last appeal, become anything substantially different from what it once was. [¶] All that has happened is that the focus of the pleadings in *Weikel II* has been changed from the (now-rescinded) 'lot line adjustment,' which was at issue in

Weikel I to the underlying earlier 'access easements,' also at issue in the earlier action. The true interest of Weikel, the ability to construct a building on a portion of the 'wedge,' remains unchanged . . . ." (*Id.* at p. 1249.)

The same is true here. Appellant's complaints alleged the same injury despite the different theories by which she sought recovery. Since the harm she alleged to have suffered was identical, the suits were both based on violation of the same primary right.

Each of appellant's complaints also alleged breach of warranty, in *Lovell I* the five-year warranty signed by Qiu and covering the "roof, attached fixtures, foundation and walls," and in *Lovell II*, the 10-year warranty signed by all the parties, which expressly referenced "SB 800 Subchapter 722" and specified "plumbing" and "electricity," as well as "roof," "attached fixtures," "foundation" and "walls." The trial court in the present case and this court in *Lovell I* stated that the complaint in *Lovell I* did not raise any claim under the 10-year warranty. Appellant concludes that breach of the 10-year warranty is a different cause of action than breach of the warranty alleged in *Lovell I*.

Appellant cites *Mycogen, supra,* 28 Cal.4th 888, for the proposition that res judicata in contract disputes is "usually applied when there is a single breach of the same contract." Here, according to appellant, there are separate breaches of two separate contracts, each signed by different parties and containing different promises. The scope of appellant's protection, she argues, is much broader under the 10-year warranty than under the five-year one.

Appellant's argument again misconceives the nature of the "primary right" that defines a cause of action under California law. As we have discussed, a primary right is the plaintiff's right "to be free from the particular injury suffered," as distinguished from the legal theory of liability or remedy sought. (*Mycogen, supra,* 28 Cal.4th at p. 904.)[9] A

[9] *Mycogen* held that a suit seeking damages for breach of contract was barred by a prior action between the same parties seeking declaratory relief and specific performance of the same contract. In the first case, plaintiff sought to enforce an option agreement for the defendant to license certain technology to the plaintiff's predecessor company; the

plaintiff may assert multiple theories of liability (such as strict liability, negligence and breach of contract) and may be entitled to multiple forms of relief (such as injunctive orders and damages), but if there is a single injury, there is a single cause of action. (*Ibid.*)

The only injury appellant alleged was that the home she purchased from the Fongs had structural defects. Seeking to recover the costs of repairing these defects, appellant asserted several theories upon which one or more of the respondents might be liable: violation of the standards imposed by the Act, negligent construction, and breach of warranty. But these alternative theories of liability all sought the same compensation for the same injury and, thus, sought to vindicate the violation of a single primary right. Similarly, appellant's argument that there were distinct breaches of distinct warranty contracts, giving rise to distinct causes of action, is erroneously based on the remedy sought rather than the injury suffered. That the 10-year warranty offered her broader protection in that it covered a longer period of time and specified additional aspects of the construction does not alter the injury appellant in fact suffered. The claim that respondents breached the 10-year warranty, which appellant told the trial court superseded the five-year warranty, was one avenue by which appellant sought to recover for the defective construction of her home—an alternative theory to her claims of statutory violation, negligence, and breach of the five-year warranty. Underlying all these claims was the same injury—the identical defective construction—and the same alleged conduct by respondents—failure to provide a home free of construction defects.

Appellant also argues that provisions of the Act demonstrate it was not intended to have a preclusive effect on actions for violation of a warranty contract. She relies upon

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defendant refused on the ground that the agreement was not transferable. (*Mycogen, supra,* 28 Cal.4th at pp. 893-894.) After a judgment in favor of the plaintiff, the parties disputed exactly what technology the defendant was required to provide and the plaintiff initiated contempt proceedings, which concluded in the defendant's favor. (*Id.* at pp. 894-895.) In the second case, the plaintiff sued for damages for breach of the licensing agreement based on the defendant's refusal to honor the licensing agreement. (*Id.* at pp. 893-895.) The second suit was barred by res judicata because it was based on the same primary right as the prior action. (*Id.* at p. 909.)

two provisions of the Act. Section 936 provides, among other things, "All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved." Section 943, subdivision (a), provides in part, "In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute."

Appellant likens these provisions to provisions in the Corporations Code construed in *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327 (*Branson*) as demonstrating that an action for indemnity under the statute did not have preclusive effect on a subsequent action for contractual indemnity. The plaintiff in *Branson* sought indemnity from his corporate employer for a judgment that had been entered against him by filing a motion in the underlying case for indemnity under Corporations Code section 317. This statute authorizes corporations to indemnify their agents for judgments and expenses arising from proceedings against them based on actions taken as agents of the corporation, acting in good faith and in a manner believed to be in the best interests of the corporation. The plaintiff's motion was ultimately unsuccessful because his actions had been taken for his own benefit, not the corporation's, and he had not acted in good faith. (*Id.* at p. 337.) Subsequently, he filed a separate suit alleging a number of claims including breach of an express indemnity contract and equitable estoppel. One of the several reasons given by the *Branson* court for finding the suit was not barred by the prior motion for indemnity was that section 317 "expressly declares that it does not 'affect any right to indemnification to which persons other than directors and officers may be entitled by contract or otherwise.' (Corp. Code, § 317, subd. (g).) By its very terms, the statute declares that the granting or denying of relief under it has no preclusive effect on any other legal right Branson may have for indemnity. Hence the Legislature has made the policy decision that whatever similarities there may be between applications under Corporations Code section 317 and other causes of action for indemnity, the proceedings

under that section will not have a preclusive effect on related actions for indemnity. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 851.)" (*Branson,* at p. 345, fn. omitted.)

The language of Corporations Code section 317, subdivision (g), is not as explicit regarding preclusive effect as that in the case *Branson* cited as authority. The statutes at issue in *Gikas v. Zolin, supra,* 6 Cal.4th at page 851, concerning drivers' license suspensions, expressly stated that findings in administrative proceedings "shall have no collateral estoppel effect on a subsequent criminal prosecution" and "shall not preclude the litigation" of the same or similar facts in the criminal proceeding. (Veh. Code, § 13353.2, subd. (e); see §§ 13557.7, subd. (f), 13558, subd. (g), 13559, subd. (b).) *Branson* apparently viewed the language in Corporations Code section 317, subdivision (g)—statutory right "does not affect" rights to indemnity based on contract or other grounds—as a sufficiently clear expression of intent to avoid preclusion of non-statutory actions. The language appellant points to in the Act states only that the Act "does not apply" to actions based on contract, fraud, personal injury or violation of a statute (§ 943) and that specified contract actions are "preserved" (§ 936). This language simply indicates that relief under the statute is not exclusive so as to preclude resort to other available remedies. (*Liberty Mutual, supra,* 219 Cal.App.4th at p. 109 ["Right to Repair Act does not expressly or impliedly support an argument that it mandates an exclusive remedy, and certainly does not derogate common law claims otherwise recognized by law"].) This means that seeking relief under the Act does not prevent also pursuing other available remedies. We see nothing in the statutory language, however, to indicate that the Legislature intended to insulate determinations made in an action under the Act from future preclusive effect. [10]

[10] In the trial court, appellant relied heavily upon *Branson*, *supra*, 24 Cal.App.4th 327 to argue that her two complaints alleged different causes of action because of the different elements of strict liability under the Repair Act, negligence, and breach of contract. On this appeal, aside from the issue of statutory interpretation just discussed in the text, she mentions *Branson* only in describing the procedural history of the case, characterizing it as having held that "if a claim is not litigated in the prior action, there cannot be res judicata." This is not an accurate description. *Branson* gave three reasons

As *Mycogen* explained, " ' "[r]es judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' (*Weikel*[, *supra,*] 55 Cal.App.4th [at p. 1245].) A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and

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for its conclusion that the plaintiff's motion for indemnity under Corporations Code section 317 did not preclude a subsequent action for breach of contract and estoppel. One was the statutory language discussed above. Another was that the plaintiff's claims involved distinct primary rights: The statute "merely" gave corporate agents the "right to seek authorization for indemnity against adverse judgments rendered against them for their reasonable and good faith acts on behalf of the corporation," while an indemnity contract gave the "right to indemnity pursuant to the terms of the contract," and equitable estoppel gave rights "aris[ing] from declarations or conduct of the party estopped." (*Branson,* at p. 343.) The court did not further explain its primary rights analysis, and it has been viewed as indicating that the applicability of res judicata can turn on the availability of differing remedies (*Furnace v. Giurbino* (2016) 838 F.3d 1019, 1027, 2028, fn. 4 [noting *Branson* as example of California cases that "might suggest that the availability of differing remedies would counsel against the application of claim preclusion"]). We understand the court's point to be that the right to indemnity and corresponding duty to indemnify were substantively different under the statute (right to indemnity for actions taken in certain circumstances, if authorized after the fact by directors, shareholders, legal counsel, or court) than they would be pursuant to a contract or equitable estoppel (indemnity in circumstances previously agreed to). In the present case, appellant's allegations all involved the same right (to purchase a home free of construction defects) and duty (to provide a home free of such defects) and her claims for violation of the Repair Act, negligence and breach of warranty were simply different theories by which she might recover for the same injury.

The third basis for the *Branson* decision is also absent in the present case. In *Branson,* the claims for breach of contract and equitable indemnity "were not recoverable" in the proceedings on the motion under Corporations Code section 317. (*Branson, supra,* 24 Cal.App.4th at p. 344.) *Branson* relied upon the rule that res judicata does not apply where the plaintiff " 'was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.' (Rest.2d Judgments, § 26, subd. (1)(c), pp. 233-234.)" (*Branson,* at p. 344.) Here, nothing prevented appellant from raising all her claims in the original action.

wasted effort and expense in *judicial administration*.' (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.)" (*Mycogen, supra,* 28 Cal.4th at p. 897.) *Lovell II* violated these principles.

B.

Lovell I resulted in a judgment on the merits that was affirmed on appeal. Two points were dispositive. First, appellant's claim under the Act could not prevail because, as none of the respondents came within the statutory definition of "builder," the Act did not apply. Second, appellant's claim of breach of warranty could not prevail because Qiu was not informed of the alleged defects within the five-year term the warranty specified. Appellant correctly states that neither the trial court nor this court on appeal decided whether the home was constructed negligently or whether the 10-year warranty was breached, because those issues were not alleged in *Lovell I.* Appellant is incorrect, however, that this means there was no final judgment on the merits to give *Lovell I* res judicata effect.

Appellant argues that the issues of negligence and breach of the 10-year warranty could not have been litigated and determined on the merits in *Lovell I* because, as both the trial court and this court expressly stated, neither of these claims was before the court. This argument appears to confuse the requirements of *claim preclusion* with those of *collateral estoppel.* As we have said, res judicata—*claim preclusion*—bars litigation "not only of issues that were *actually* litigated in the prior proceeding, but also issues that *could have been litigated* in that proceeding.)" (*Zevnik, supra,* 159 Cal.App.4th at p. 82, italics added.) Thus, for purposes of *claim preclusion*, "it is of no moment whether the identical causes of action were *in fact* litigated in [*Lovell*] *I*; all that is required is that [appellant] have had the *opportunity* to litigate them in [*Lovell*] *I*." (*Weikel, supra,* 55 Cal.App.4th at p. 1245.)

Collateral estoppel—*issue preclusion*—shares three prerequisites with res judicata: " ' "(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in

privity with a party to the prior proceeding.' " (*Zevnik, supra*, 159 Cal.App.4th at pp. 82-83, quoting *People v. Barragan* (2004) 32 Cal.4th 236, 253.) But collateral estoppel *also* requires "the additional elements that the issue to be precluded was actually litigated and necessarily decided. (*Lucido v. Superior Court* [(1990)] 51 Cal.3d [335,] 341*; Taylor v. Hawkinson* (1957) 47 Cal.2d 893, 895–896.) The ' "necessarily decided" ' requirement generally means only that the resolution of the issue was not ' "entirely unnecessary" to the judgment in the initial proceeding.' *(Lucido*, . . . at p. 342.)" *(Zevnik*, at p. 83.)

Appellant's misconception is reflected in the questions she poses—"[h]ow could the substantive merit of the [10-year] warranty be determined if it 'was not a question of fact framed by the pleading' in the first case?" and, "[i]f these issues [contractor negligence and breach of the 10-year warranty] were not before the court, how could they have been litigated and determined on the merits?" Her assertion that she "never had a 'final determination on the merits' in the first case on the actions presented in her second complaint" might have relevance if the issue before us was issue preclusion. But it is not. For purposes of *claim* preclusion, the required "final determination on the merits" is with respect to the claims presented in the *first* case. The question for res judicata analysis is not whether the court in the prior proceeding decided the substantive merit of the claim sought to be raised in a later case. When the claim raised in the second action is based on the same primary right as the claim in the first action, the question is whether the claim raised in the *first* action was resolved on the merits and whether the newly raised claim *could have been* litigated in the first case.[11]

[11] Appellant incorrectly characterizes the Fongs as arguing that "the requirement of final judgment on the merits only applied to issue preclusion ('collateral estoppel') and not to claims preclusion." The distinction drawn by the Fongs is that issue preclusion applies only if the issue sought to be precluded was *actually litigated* in the first action, while claim preclusion can apply as long as there was an *opportunity* to litigate the issue. Nor have the Fongs argued, as appellant suggests they have, that appellant was "compelled to amend her complaint" to add different causes of action, or that "there was a merit determination of claims not before the court." Responding to the Fongs' quotation of the court's statement in *Weikel, supra*, 55 Cal.App.4th at page 1245, that "[f]or purposes of this analysis, it is of no moment whether the identical causes of action

Appellant does not argue that she *could not have* alleged her claims for negligence and breach of the 10-year warranty in *Lovell I.* Indeed, appellant argued on her appeal in that case that she should have been given leave to amend her complaint to allege these issues. In rejecting that argument, we noted that appellant had not sought leave to amend in the trial court, "[e]ven when it became clear, during the hearing on the summary judgment motions, that the court rejected some of [appellant's] arguments because they involved issues that were not within the scope of her complaint" and stated that "we have no reason to believe that it would have been futile for her to do so when she filed her oppositions or perhaps even by the time of argument on the motions." It is apparent that the claims appellant sought to litigate in *Lovell II could have been litigated* in *Lovell I.* Accordingly, the fact that these issues were not *actually* litigated and decided does not preclude application of res judicata.

The cases appellant offers to support her view that her claims of negligence and breach of the 10-year warranty were not barred by res judicata because they were not in fact litigated and determined in *Lovell I* do not do so.

Stark v. Coker (1942) 20 Cal.2d 839, 843, held that while res judicata generally applies to "all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation and every matter coming within its legitimate purview," "when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matter which the court expressly refrains from determining." In that case, the trustee under a deed of trust securing her loan to a corporation was unsuccessful

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were in fact litigated in *Weikel I,*" appellant provides the full paragraph in which the quoted text appeared and argues that the court "did not hold that the opportunity to join a cause of action is equivalent to a merit determination thereof" but rather that a cause of action "must be determined on the merits at a fair trial in which the litigant has the opportunity to present all theories under that cause of action." The Fongs have not suggested that "opportunity to join a cause of action is equivalent to a merit determination," and the portion of the *Weikel* court's analysis appellant offers for "context" is completely consistent with both the Fongs' argument and our own discussion.

in an action to set aside her reconveyance of the property embraced in the trust deed. The court found that her husband, who was one of the plaintiffs in that action, had no notice or knowledge of the reconveyance, and therefore expressly stated that the judgment was "without prejudice" to the husband's right to pursue any rights he might have in the property "in another action." (*Id*. at p. 842.) Concluding that res judicata did not bar the husband's subsequent suit to foreclose on the trust deed, *Stark* explained that if there was an "improper splitting of actions on the note" as the defendants urged, the prior judgment "was in effect a determination that a splitting of causes of action was proper" and was final and binding even if erroneous. (*Id.* at pp. 842-844.)

In *Cason v. Glass Bottle Blowers Assn.* (1952) 37 Cal.2d 134, the first judgment held the plaintiff was entitled to damages after being wrongfully suspended from his union without notice and a hearing, but denied an injunction requiring reinstatement on the ground that it would interfere with ongoing union procedures for review of the disciplinary order. (*Id*. at pp. 139-141.) After the union ruled against the plaintiff, he brought an action for damages and reinstatement. The court held the former judgment was res judicata as to the original suspension and resulting damages but not as to "matters which the court expressly refused to determine and which it directed should be litigated in another forum or in another action." (*Id.* at p. 141.) *Cason* stated, "it is clear that the prior judgment in effect determined that a wrongful refusal by the union to reinstate plaintiff would constitute a new and independent wrong giving rise to a new cause of action. Accordingly, the rule that a party cannot split his cause of action and obtain piecemeal recovery is inapplicable." (*Ibid.*)

Stark and *Cason* held that res judicata does not apply when the court in the first action specifically contemplated there would be a separate action on the issue sought to be litigated in the second case. Unlike those cases, nothing in the trial court's decision or our opinion in *Lovell I* suggested any contemplation that appellant would be able to pursue additional claims related to the same subject matter in further litigation.

Appellant also tries to avoid the bar of res judicata by reference to cases holding there is no final judgment on the merits where the first case is resolved on technical or

procedural rather than substantive grounds. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76 [judgment denying relief on ground of laches not "on the merits" for purposes of res judicata]; *Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591, 1596 [action terminated due to statute of limitations not preclusive because not on the merits].) But that is not what happened here. The court granted summary judgment to defendants in *Lovell I* because appellant failed to raise a triable issue of fact as to one of the elements of each of the claims she alleged. Appellant argues that the trial court in *Lovell I* did not decide "the substance of the complaint" because it did not determine whether there were construction defects, but the fact that the court did not reach *all* the issues raised by the complaint does not mean the matter was not resolved "on the merits." The determination that respondents were not "builders" within the statutory definition was fatal to appellant's claim under the Act on substantive, not procedural, grounds.

Nor did the court in *Lovell I* rule on procedural grounds with regard to the alleged breach of warranty. Appellant's argument that the court found this claim "time barred" rather than ruling on the merits is not correct. *Lovell I* held that appellant could not recover for breach of the five-year warranty because she did not report the defects until after the warranty had expired. Despite any superficial similarity, this was not a statute of limitations ruling; the court did not find that appellant failed to bring her breach of warranty claim *in court* within the period of time prescribed by law for initiation of suits on claims of this nature. Rather, the court held because the warranty period had expired before appellant reported the defects, there was no longer an operative warranty and refusal to make repairs was not a breach.

II.

Appellant challenges the trial court's amendment of the judgment to award attorney fees after appellant had filed her notice of appeal. She contends the amendment was impermissible because it materially altered the parties' rights, as well as that the parties' purchase agreement precluded the Fongs from recovering attorney fees because they refused to mediate the dispute.

Appellant relies upon the rule that, once entered, a judgment may not be amended to "substantially modify it or materially alter the rights of the parties." (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237.) This reliance is misplaced. A modified judgment which adds only costs and attorney fees "makes no substantive changes to the earlier judgment which finally disposed of all legal issues between the parties" and thus constituted a final judgment. (*Amwest Surety Ins. Co. v. Patriot Homes, Inc.* (2005) 135 Cal.App.4th 82, 84, fn. 1; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222, Eisenberg et. al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 3:56:3, p. 3-30.)

Contrary to appellant's assertion, the amendment of the judgment found to be a "substantial modification" in *Stone v. Regents of the University of California* (1999) 77 Cal.App.4th 736, 743-744, is not "similar" to the one here. The initial judgment in *Stone* required the Regents of the University of California to pay for the legal defense of a physician in a suit against him by a former patient from a specified date. (*Id.* at p. 743.) Subsequently, the court modified the judgment to require payment of defense costs from a date nine months earlier. (*Ibid.*) The modification was "undeniably one of substance" because it required payment of an additional nine months of legal expenses, which "materially affected" the Regents' rights. (*Id.* at p. 744.) The modification in *Stone* altered the substantive relief awarded in the action, not, as here, the collateral matter of attorney fees.

Appellant more seriously presses the argument that the Fongs were not entitled to fees due to their refusal to mediate. The parties' purchase agreement contained the following provision: "If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action." As indicated above, appellant opposed the Fongs' attorney fees request in part based on their refusal to mediate before she filed her complaint in *Lovell I.* Appellant did not request mediation before filing *Lovell II* but, after the Fongs'

argued that the contractual prohibition did not apply for this reason, appellant filed a demand for mediation on February 25, 2015—the day before the Fongs' motion for attorney fees was set for hearing, after the trial court issued its tentative ruling granting the Fongs' motion for fees as prevailing parties in the action.

The trial court held that the Fongs were not precluded from recovering fees because appellant did not request mediation "before filing [*Lovell II*] or at any time before entry of judgment" and the "provision barring recovery of fees to a party who refuses a request for mediation is most reasonably construed to require a new request for mediation when a second action is filed, even if a request for mediation was made and refused prior to the commencement of an earlier related action. The policy in favor of encouraging parties to mediate is fully supported by an interpretation of this provision as requiring a new request for mediation made before a new lawsuit is filed or while it is pending." The court rejected appellant's argument that her February 25, 2015 demand for mediation triggered the contractual penalty, viewing the requirement that a party accept mediation as a prerequisite to recovery of attorney fees as having "virtually no purpose after the court issues a dispositive ruling, even if the action can be appealed." The court stated that the purposes of the mediation provision, encouraging mediation at the earliest possible time and promoting mediation as a preferable alternative to judicial proceedings, are not furthered "by allowing a party to file an action, force the other party to incur attorney's fees, and then, after entry of an adverse judgment, demand mediation for the purpose of preventing the opposing party from recovering attorney's fees." Respondents had "virtually no incentive to reach a mediated settlement" at the point appellant requested mediation, in the court's view, as they had already incurred attorney fees in order to obtain a judgment in their favor and engaging in mediation would only increase the parties' costs with no corresponding benefit.

Relying upon the Fongs' refusal of the mediation request appellant made before filing *Lovell I,* appellant argues that the mediation provision does not require more than one request to mediate during the course of litigation and a single refusal to mediate will forfeit any right to recover attorney fees. This argument ignores the effect of appellant

having filed two separate suits and failed to make a timely request for mediation in the second one.

Frei v. Davey (2004) 124 Cal.App.4th 1506 (*Frei*), upon which appellant relies in arguing that a single refusal to mediate will forfeit a claim for fees, involved a single action. Prospective buyers sued for specific performance after sellers cancelled a residential purchase agreement containing a mediation provision like the one at issue in the present case. (*Id.* at pp. 1509-1510.) Buyers demanded mediation prior to filing suit but received no response, then upon further inquiry after filing suit were informed sellers did not wish to mediate. (*Id.* at p. 1513.) Almost a year later, shortly before the trial date, an unsuccessful mediation was conducted at the request of a party against whom sellers had filed a cross complaint. (*Id.* at pp. 1510, 1517.) After a judgment in favor of buyers was reversed on appeal, sellers successfully moved for attorney fees. (*Id.* at p. 1510.) In reversing the award because of sellers' refusal to mediate at the outset of the case, the *Frei* court stated, "The [sellers'] refusal to mediate could not be cured one year later. The purpose of the early mediation requirement is to minimize the costs of litigation and arbitration. To allow a party to wait one year until the eve of trial to accede to a request for mediation would defeat that purpose." (*Id.* at p. 1517.) *Frei* says nothing about whether a refusal to mediate in response to a request made before instituting an action forfeits attorney fees in a related but separate action under the same contract.

In the other case appellant relies upon, *Cullen v. Corwin* (2012) 206 Cal.App.4th 1074 (*Cullen*), buyers sued sellers for failing to disclose the defective condition of the garage roof of a house. Buyers did not request mediation prior to filing suit, but did so twice afterward. (*Id.* at p. 1077.) The trial court granted summary judgment in favor of sellers and awarded them attorney fees. (*Id.* at p. 1076.) On appeal, sellers attempted to avoid the consequence of their refusal to mediate by arguing that they were required to mediate only if a request was made *before* initiation of litigation. (*Id.* at p. 1079.) The Court of Appeal reversed the fee award, rejecting this argument as unsupported by the language of the mediation provision, which (as in the present case) stated, " 'If . . . any party *commences* an action without first attempting to resolve the matter through

mediation, *OR refuses to mediate after* [*the making of*] a request . . . , then that party shall not be entitled to recover attorney[] fees . . . .' " (*Ibid.*, italics and capitalization added in *Cullen*.) In other words, the need to request mediation before beginning litigation is significant, under the mediation provision, only with respect to a plaintiff's recovery of fees. Like *Frei*, *Cullen* says nothing about the effect of a request or refusal in one case on entitlement to fees in a related but separate action.

Appellant offers no authority for her contention that a refusal of a pre-litigation request for mediation in one case forfeits the right to attorney fees in a subsequent separate action in which no request was made. Nor is appellant's argument supported by contractual language or policy. The mediation provision applies to "any dispute or claim to which this paragraph applies." *Lovell II* was a new action, filed after a final judgment was rendered in *Lovell I* and affirmed on appeal, and raising claims that had not been asserted in *Lovell I.* The mediation provision is " 'designed to encourage mediation *at the earliest possible time*' " and supports the "strong public policy in the promotion of mediation ' "as a preferable *alternative* to judicial proceedings" ' in a less expensive and more expeditious forum." (*Cullen, supra*, 206 Cal.App.4th at p. 1079, quoting *Lange v. Schilling* (2008) 163 Cal.App.4th 1412,1418.) We agree with the trial court that the policy favoring mediation is supported by interpreting the contractual mediation provision as requiring a new mediation request in each separate case arising under the contract.

Appellant urges that respondents should be estopped from asserting that *Lovell II* was a separate case because this assertion is inconsistent with and contradicts their previously stated position that *Lovell II* was a "continuation" of *Lovell I.* As noted earlier, the Fongs made this argument in opposing appellant's efforts to avoid having *Lovell II* assigned to the judge who presided over *Lovell I.* (See fn. 7, *ante*.) The trial court rejected appellant's estoppel argument because the Fongs' "continuation"

characterization had previously been rejected by the court[12] and "[t]he doctrine of judicial estoppel is applicable only if the position previously taken by the party was successful. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)" In asserting on this appeal that the two cases are separate, the Fongs are not taking a position inconsistent with one they previously persuaded the trial court to accept; they are adhering to the trial court's determination that their previous position was erroneous.

Appellant also argues the trial court erred in finding her February 25, 2015, request for mediation ineffective to trigger the mediation provision. She relies upon *Cullen, supra,* 208 Cal.App.4th 1074, in which the defendants were held to have forfeited their right to attorney fees even though the plaintiff had not requested mediation until after initiating the lawsuit. As we have seen, *Cullen* interpreted the mediation provision as treating requests for mediation and refusals to mediate differently: A *plaintiff* would be able to recover attorney fees only if he or she *requested* mediation *before* filing suit, but *refusal* of a request for mediation, even a request made after institution of litigation, would forfeit the right to attorney fees. (*Id.* at p. 1079.)

The opinion in *Cullen* did not specify exactly when the plaintiff's two requests for mediation were made, but it did state that at the time of the second request, defense counsel had billed "*only* about $4,300 in legal fees."[13] (*Cullen, supra,* 206 Cal.App.4th at p. 1077, italics added.) The obvious inference to be drawn from this description is that the *later* request to mediate was made at a relatively early stage of the litigation. The

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[12] The trial court recognized that the two cases were "unquestionably related," involving identical parties and arising out of the same "relationship and dispute." It concluded that *Lovell II* was *not* a continuation of *Lovell I,* however, because *Lovell II* was "based upon breach of an agreement that was specifically found to be not at issue in *Lovell I*" and, for the continuation rule to apply, " 'the second proceeding must arise out of the first proceeding—not merely . . . out of the same incidents or events that gave rise to the first proceeding. (*NutraGenetics, LLC v. Superior Court* [(2009)] 179 Cal.App.4th [243,] 257.)' "

[13] This amount was just over one quarter of the total fees ($16,500) subsequently awarded at the end of the case. (*Cullen, supra,* 206 Cal.App.4th at p. 1076.)

Cullen court emphasized the purposes of the mediation provision relied upon by the trial court here—encouragement of mediation at the "earliest opportunity" and furthering the policy of encouraging mediation as a less expensive and more expeditious means of dispute resolution than judicial proceedings. (*Id.* at p. 1079.) In light of this policy, *Cullen* rejected the defendants' argument that they were entitled to demand discovery responses before agreeing to mediation: "The costly and time-consuming procedures connected with discovery are thus not a necessary adjunct to mediation proceedings that a party can demand before participating." (*Ibid.*) Given this reasoning, we do not read *Cullen* as supporting appellant's contention that the mediation provision of the parties' contract requires denying the Fongs attorney fees because they refused a request for mediation appellant filed not just after instituting a new suit but after an adverse judgment on the merits had been entered and a tentative ruling granting the Fongs' attorney fee request had been issued. As the trial court explained, "allowing a party to file an action, force the other party to incur attorney's fees, and then after entry of an adverse judgment, demand mediation for the purpose of preventing the opposing party from recovering attorney's fees" would *disserve* the policy of encouraging early mediation and produce a "dysfunctional result."

Appellant takes issue with the trial court's reasoning that the mediation provision was inapplicable because at the time appellant requested mediation, respondents had "virtually no incentive to reach a mediated settlement." Appellant points out that *Cullen* rejected arguments that mediation would not be " 'meaningful' " and would be a " 'waste of time' " as "excuses to the requirement of assenting to mediation in order to recover . . . attorney fees." (*Cullen*, *supra*, 206 Cal.App.4th at p. 1079.) The defendants in *Cullen* had argued that the plaintiffs' failure to respond to discovery requests justified their refusal to mediate; they wanted the discovery in order to file a summary judgment motion to avoid mediation, believed mediation would be meaningful only if summary judgment was denied, and believed mediation without prior discovery would be a waste of time. (*Id.* at p. 1077.) Since the contractual mediation provision was meant to encourage mediation at the earliest possible opportunity, *Cullen* held that the provision could not be

interpreted as allowing a party to demand discovery before acceding to a request for mediation. (*Id.* at p. 1079.)

This rejection of the defendants' excuse for *refusing* a request to mediate does not undermine the reasoning of the trial court in the present case in finding appellant's belated *request* for mediation ineffective to trigger the mediation provision; *Cullen* fully supports the trial court's ruling. As the trial court stated, mediation after the court had entered judgment on the merits of the dispute and issued a tentative ruling on attorney fees would only add to the parties' costs without offering any benefit. The request for mediation at this stage could not have resulted in avoidance of the need to resort to judicial proceedings, the judicial process having already been fully utilized; rather than serving as a "less expensive and more expeditious" alternative to litigation (*Cullen, supra,* 206 Cal.App.4th at p. 1079), mediation at this point would have added both time and expense to litigation that had all but concluded. Where *Cullen* refused to allow a party's subjective non-incentive to mediate to justify refusing a timely request for mediation, the trial court here simply acknowledged the objective futility of mediation requested after the opposing party has obtained a judgment on the merits in its favor and a tentative ruling awarding it attorney fees. The request at this point could only have been an attempt to deprive the Fongs of their right to attorney fees in a manner completely at odds with the purpose of the contractual mediation requirement.

Challenging the trial court's statement that the contractual mediation provision "has virtually no purpose after the court issues a dispositive ruling, even if the action can still be appealed," appellant asserts that mediation could still have served a purpose. Appellant questions what " 'dispositive ruling' " the trial court was referring to and argues that the judgment of dismissal did not address the issue of attorney fees, there had been no final ruling on fees, and cases are often mediated even on appeal. These points are unpersuasive with respect to interpretation of a contractual provision meant to foster early mediation and minimize the costs of litigation. As the *Frei* court stated in explaining why a party cannot cure its initial refusal to mediate by submitting to mediation after a year of litigation, "Of course, there is value to conducting mediations,

settlement conferences or other methods of alternative dispute resolution at various stages in litigation, whether before, during, or after trial. But when a contract conditions the recovery of attorney fees on a party's willingness to participate in mediation before the litigation begins, the window for agreeing to mediate does not remain open indefinitely. The fact the mediation conducted shortly before the initial trial date was unsuccessful does not alter this analysis. Indeed, the mediation in November 2001, might have been unsuccessful precisely because, by then, the parties had invested so much money in attorney fees and their positions had become entrenched." (*Frei, supra,* 124 Cal.App.4th at p. 1517.) These observations regarding mediation conducted shortly before trial are all the more apt with regard to mediation requested after entry of judgment and issuance of a tentative ruling awarding attorney fees.

DISPOSITION

The judgment is affirmed.

Costs to respondents.

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Kline, P.J.

We concur:

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Stewart, J.

_____
Miller, J.

Lovell v. Fong (A144637)